No. 16,405

United States Court of Appeals
For the Ninth Circuit

TRAVIS BUFORD,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S PETITION FOR A REHEARING.

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To the Honorable Richard H. Chambers, Chief Judge and the Honorable William Healy and Honorable Oliver D. Hamlin, Jr., Associate Judges of the United States Court of Appeals for the Ninth Circuit.

Comes now Travis Buford, appellant above named, and respectfully prays this Court to grant a rehearing of the above entitled cause, and in support thereof respectfully shows:

I. That the decision of this Honorable Court is based on an assumption of facts, which is not justified by the record.

II. That the proven facts upon which the opinion of this Court is specifically based are insufficient to support the judgment of conviction and are insufficient to overcome the presumption of innocence with which appellant is clothed.

I.

DISCUSSION.

THE DECISION OF THIS HONORABLE COURT IS BASED ON AN ASSUMPTION OF FACTS, WHICH IS NOT JUSTIFIED BY THE RECORD.

At the beginning of its opinion this Honorable Court, in concisely stating the facts upon which it is based, said:

> ". . . evidence was introduced to show that appellant was in the shop during both visits and that the informer left the shop both times *in possession of narcotics which she didn't have when she went in.*" (The emphasis is furnished because the emphasized portion—if that evidence is lacking—completely nullifies the government's case.)

The first valid reference to a search of the informer is at page 28 of the record, wherein defense counsel stipulated that she was searched—nowhere is there any evidence indicating the result of the search.

The next reference is at page 33 of the record where the officer merely testified that the informer was taken back to the hospital to be searched. Again no evidence is offered to the effect she did not possess narcotics.

Again at page 61 of the record, with reference to August 4th, there still is no evidence that the informer on being searched *did not have* narcotics.

Although this incident is immaterial, (page 85 of the record) the informer was brought to the Emergency Hospital on August 4th *after* she had delivered Exhibit No. 2 to the officer. Again, there is no evidence as to the result of the search.

In discussing this subject, it is important to note that there is no evidence negativing the possibility or likelihood that the informer was approached by or was in the company of any person other than appellant and thus eliminating the possibility or likelihood that the informer obtained the narcotics from some other person. To the contrary, (page 41) she was affirmatively shown to be in contact with a male negro after the search—and before the alleged receipt of the narcotics.

Page 49 indicates no one knows with whom she was in contact. At page 51 she was out of view of the officer. At page 52 it affirmatively appears she could have been in contact with any number of persons. At page 62 she was out of view of the officer.

It was held in:

> *People v. Morgan,* 157 Cal. App. (2d) 756, 321 Pac. (2d) 873,

that there was a fatal gap in the chain of evidence between the time the participant-informer left the presence of the officer and returned with the evidence.

This *Morgan* case followed the law laid down in:

People v. Richardson, 152 Cal. App. (2d) 310, 313 Pac. (2d) 651;

People v. Barnett, 118 Cal. App. (2d) at 338, 257 Pac. (2d) 1041.

This principle was later followed in:

People v. Lawrence, 168 C.A. (2d) 510, 336 Pac. (2d) at 192.

Since there is no affirmative evidence that the informer in this case did not already possess narcotics before coming in contact with appellant and also the fact that the evidence did not eliminate the possibility that the narcotics may have been procured from some person other than appellant—it is obvious that an indispensable link in the chain of evidence is missing here.

This Honorable Court again repeated the incorrect assumption that the informer *twice entered appellant's barber shop without narcotics and twice left the shop with them; and appellant was placed in the shop on both occasions.* (Page 2 of the opinion.)

There just simply is no evidence that the informer did not have narcotics when she entered the shop—and the evidence is very clear that other people were in the shop, and could have been the informer's supplier.

Since the conviction on the charges, including the conspiracy, is based on such a false premise, and since this Honorable Court clearly followed in the trial Court's misapprehension of the proven facts—the af-

firmance by this Court must, in fairness to appellant, be reconsidered.

PRAYER.

Wherefore, appellant prays that this Honorable Court make its order staying its mandate and grant a rehearing, or if the Court refuses to grant such rehearing that it stay the mandate pending the filing by petitioner and appellant of a petition for certiorari in the Supreme Court of the United States and pending disposition by that Court.

Dated, San Francisco, California,
December 1, 1959.

Respectfully submitted,
MORRIS OPPENHEIM,
ARTHUR D. KLANG,
By ARTHUR D. KLANG,
Attorneys for Appellant and Petitioner.

Certificate.

I, Arthur D. Klang, attorney for appellant, hereby certify that this petition is presented in good faith; that it is not interposed for delay, and that in my judgment it is well founded.

Dated, San Francisco, California,
December 1, 1959.

Arthur D. Klang.